Supreme Court, U. S.
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In the
Supreme Court of the United States.

OCTOBER TERM, 1978.

No. 78-1279.

RALPH H. ARABIAN ET AL.,
PETITIONERS,

v.

JOHN J. DALEY ET AL.,
RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Brief for Respondent Joseph S. Ayoub in Opposition.

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Opinion Below.

The opinion of the Court of Appeals for the First Circuit, entered on November 21, 1978, appears on page 1a of petitioners' Appendix A, included in the petition for writ of certiorari filed herein; that court found petitioners' claim to be without merit and affirmed sua sponte the judgment of the three-judge District Court.

The judgment of the three-judge court, entered on September 7, 1978, appears on page 2a of petitioners' Appendix A, included in the petition for writ of certiorari filed herein; that court ordered and adjudged that the complaint be dismissed for failure to state a claim upon which relief could be granted under Rule 12(b)(6), Fed. R. Civ. P., in accordance with the memorandum of decision filed contemporaneously therewith.

The aforesaid memorandum of decision on motion to dismiss, dated September 7, 1978, appears on pages 3a-9a of petitioners' Appendix A, included in the petition for writ of certiorari filed herein.

Questions Presented for Review.

The petitioners herein seek to have a certain statute, Mass. Gen. Laws c. 208, § 17, and a probate rule, Massachusetts Probate Court Rule 47 (both of which were amended and/or repealed in 1975[1]), declared unconstitutional; these related

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[1]The rule and statute as they now appear:

"SUPPLEMENTAL RULES OF PROBATE COURT PURSUANT TO RULE 83 MASSACHUSETTS RULES OF CIVIL PROCEDURE.

"Effective July 1, 1975.

"Rule 406. *Allowance to Defend.*

"An application by a party for an allowance to enable him to defend or prosecute a complaint shall contain a statement that he intends in good faith to defend or prosecute such complaint, and shall be accompanied by a certificate of his attorney that he believes such statement to be true. If such allowance is granted, it shall be paid as the court may direct.

"*Comment*: This rule restates, with one modification, Probate Rule 47."

to the authority of a court to award attorney's fee in a divorce case. *The probate rule*, Massachusetts Probate Court Rule 47, as it existed before being repealed, appears on page 4a of petitioners' Appendix A included in the petition for writ of certiorari filed herein. *The statute*, Mass. Gen. Laws c. 208, § 17, as it existed prior to being amended in 1975, appears on page 4a of said Appendix A.

Counter-Statement of Facts.

The petitioners claim that the enforcement of former Mass. Gen. Laws c. 208, § 17 (hereinafter, Section 17), and former Massachusetts Probate Court Rule 47 (hereinafter, Rule 47) deny them equal protection of the laws and due process of law in violation of the Fourteenth Amendment to the United States Constitution and 42 U.S.C. §§ 1981, 1985(3) and 1988. They request declaratory and injunctive relief in addition to damages.

MASSACHUSETTS GENERAL LAWS, CHAPTER 208.

Domestic Relations.

§ 17. [Pendency of action; allowance; alimony.]

"The court may require either party to pay into court for the use of the other party during the pendency of the action an amount to enable him to maintain or defend the action, and to pay to him alimony during the pendency of the action." (Amended by St. 1975, c. 400, § 21.)

1975 Amendment: St. 1975, c. 400, § 21, approved July 2, 1975, and by § 79 made effective July 1, 1975, rewrote the section.

St. 1975, c. 400, conformed the General Laws to the Massachusetts Rules of Civil Procedure governing domestic relations proceedings, also effective July 1, 1975.

Each of the wives of the petitioners, husband-parties to divorce libels, through her attorney, applied to the Probate Court pursuant to former Section 17 and former Rule 47 to require her husband to pay the attorney's fees she incurred in connection with the divorce action. The Probate Court granted several of these applications, and petitioners paid the sums rather than face contempt. The petitioners now challenge the constitutionality of the *former* Section 17 and Rule 47, both of which were repealed in 1975, arguing that both provisions discriminate on the basis of sex by allowing a wife to obtain counsel fees from her husband without according the husband a similar privilege.

The respondent, Joseph S. Ayoub (hereinafter, Ayoub), is a lawyer and was engaged by Patricia Arabian (hereinafter, Mrs. Arabian) to represent her in her action for divorce against her husband, Ralph H. Arabian, one of the petitioners in the present proceedings, which divorce was pending in Plymouth Probate Court, No. 20404, in Massachusetts; he represented Mrs. Arabian during the approximate period commencing October 26, 1970, to December, 1972; in the course of the divorce proceedings, acting under former Mass. Gen. Laws c. 208, § 17,[2] and Massachusetts Probate Rule 47,[3] he applied to the Probate Court pursuant to former Section 17 and former Rule 47 to require petitioner Arabian to pay his fees incurred in connection with the divorce action; the Probate Court granted the application.

There is no case or controversy existing between the petitioner Schlichte and the respondent Ayoub. *Ayoub did not appear or represent either of the parties in the Schlicte divorce proceedings.*

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[2]Section 17 was repealed in 1975.

[3]Rule 47 was repealed in 1975.

Subsequent to the filing of the original complaint in this action, the Massachusetts Supreme Judicial Court in *House* v. *House*, 368 Mass. 120 (1975), addressed the identical equal protection argument presented by the petitioners in the instant case. *House* involved the denial of a wife's application for counsel fees made at the time of the grant of a decree nisi in her divorce action. The Massachusetts Supreme Judicial Court held that the statutory scheme governing counsel fees in divorce actions, taken as a whole, did not discriminate on the basis of sex. Contrary to the assumption of the probate judge, the court held that Rule 47 conferred no right to counsel fees in divorce cases; it merely specified the requirements that a wife's application must meet. 368 Mass. at 121. Although Rule 47 itself does not apply to husbands, the court found that the same good faith showing must nevertheless be made by a husband seeking counsel fees from his wife. 368 Mass. at 121. *Since procedural burdens were identical for both husband and wife, former Rule 47 under the general statutory scheme did not discriminate on the basis of sex.*

Turning to the question of the Probate Court's power to approve applications for counsel fees, the Supreme Judicial Court held that Mass. Gen. Laws c. 208, § 38, *grants that authority without regard to the sex of the applicant*, even though Section 17, as it read at the time of the *House* decision, conferred the same power only in connection with a wife's petition. 368 Mass. at 121-122. *The court's interpretation of the statutory scheme avoided the need to decide the constitutional question, since the provisions as a whole accorded husbands and wives equal treatment.*

Moreover, after the decision in the *House* case, Section 17 was amended to eliminate all reference to sex. *See* St. 1975, c. 400, § 21. Husbands and wives may now rely on both Sections 17 and 38 to obtain counsel fees from the opposing party.

Argument.

There does not appear to be any actual conflict with the decisions of this Court or of any other circuit, and no important questions of federal law not previously adequately dealt with by this Court or by the State Supreme Court are raised in the present proceedings.

I. There are No Special or Important Reasons for Granting Review on Writ of Certiorari on this Petition.

This Court decided, on March 5, 1979, *Orr* v. *Orr*, No. 77-1119, and the issues raised in *Orr* are closely related to those issues raised in the present proceedings. The decision in *Orr, supra*, does not support the issues raised by the petitioners in their petition for writ of certiorari filed herein. In *Orr, supra*, the appellant questioned the constitutionality of Alabama's alimony statutes, *which specifically provided that husbands but not wives may be required to pay alimony upon divorce.*

Application of Orr to Instant Case.

The *Orr* case must be distinguished on the facts which exist in the instant case.

The Massachusetts statutory scheme *is not the same as the Alabama statutory scheme referred to in Orr.* In Massachusetts the statutory scheme permitted and still permits *both husband and wife* to seek counsel fees. *See House, supra*, which sets forth the Massachusetts statutory scheme permitting applications for counsel fees by both parties to divorce, *without regard to the sex of the applicant.* We respectfully suggest that the *House* case is dispositive of the present proceedings.

See also Kelley v. *Kelley*, decided by the Massachusetts Supreme Judicial Court on March 31, 1978, Mass. Adv. Sh. (1978) 816, 374 N.E. 2d 580. In *Kelley, supra*, the Massachusetts Supreme Judicial Court stated:

> "However, he has apparently either overlooked or ignored the fact that G.L. c. 208, § 38, was amended by St. 1933, c. 288, to read: 'In any proceeding under this chapter, whether original or subsidiary, the court may, in its discretion, award costs *and expenses, or either*, to either party, whether or not the marital relation has terminated. In any case wherein costs and expenses, or either, may be awarded hereunder to a party, they may be awarded to his or her counsel, or may be apportioned between them' (emphasis supplied). In *House* v. *House*, 368 Mass. 120, [330 N.E. 2d 152, 153] (1975), we referred to the 1933 amendment as follows: 'Since that amendment we have acknowledged that under § 38 "the court now undoubtedly has power to award costs and expenses, which may include counsel fees, and may order them to be paid to counsel for the opposing party."'" Mass. Adv. Sh. (1978) at 817.

The holdings of the Massachusetts Supreme Judicial Court do not bar either of the petitioners from obtaining relief in the state courts under proper circumstances, as outlined in *House*.

II. The Jurisdiction of this Court over the Constitutional Challenge Asserted by the Petitioners in this Case is Questioned in View of the Decision of the Massachusetts Supreme Judicial Court in the House Case, Supra.

The Massachusetts statutory scheme does not reflect any discrimination on the basis of sex. The Massachusetts Supreme

Judicial Court's interpretation of the statutory scheme avoids the need to decide the constitutional question since the provisions as a whole accorded husbands and wives equal treatment.

Moreover, after the decision in the *House* case, Section 17 was amended to eliminate all reference to sex. *See* St. 1975, c. 400, § 21. Husbands and wives may now rely on both Sections 17 and 38 to obtain counsel fees from the opposing party. Rule 47 was also amended in 1975, as appears above.

III. The Litigation Between the Parties Hereto does Not Present a "Case or Controversy" Within the Meaning of Article III of the United States Constitution.

It is to be noted that the respondent Ayoub did not participate in any way in the Schlicte divorce case referred to on page 5 of the petition for writ of certiorari filed herein; no case or controversy is present insofar as the respondent Ayoub is concerned.

As to the petitioner Arabian, in view of the *House* case, Arabian's remedy, if any, is available in the state courts. The equal protection question raised in this case has been mooted by the decision in the *House* case, *supra*; no case or controversy is present insofar as respondent Ayoub is concerned. *See* in this connection *Harris County Comm'rs Court* v. *Moore*, 420 U.S. 77, 83 (1975). It is to be noted that the petitioner Arabian in the case at bar did not file an application for counsel fees in connection with the Arabian divorce proceedings.

We respectfully suggest that this Court should not "sit and decide abstract questions of law in which the parties before it show no interest, and which, if decided either way, affect no right of theirs . . .. If no such right exists, the delicate duty of declaring by this court that an act of State legislation is void, is

an assumption of authority uncalled for by the merits of the case, and unnecessary to the assertion of the rights of any party to the suit." *Supervisors* v. *Stanley*, 105 U.S. 305, 311, 312 (1881). It is quite clear that the petitioners have not met the burden of proving that they were harmed as the result of an unconstitutional statute.

IV. The Respondent Ayoub is Immune from Suit in the Present Proceedings.

It is clear that the respondent Ayoub was at all times acting as a private attorney under a valid statute and rule and as such was immune from liability.

Attorneys who participate in the trial of private state court litigation are not acting under "color of state law" within the meaning of § 1983. *Meier* v. *State Farm Mutual Auto. Ins. Co.*, 356 F. 2d 504, 505 (7th Cir. 1966), cert. denied, 385 U.S. 875 (1966). The respondent attorneys, whose acts were those of an attorney as performed in his professional capacity, did not act as state officials, notwithstanding that they were officers of the court. Their conduct complained of was not action taken under "color of state law" within the meaning of § 1983. *Jones* v. *Jones*, 410 F. 2d 365, 366 (7th Cir. 1969), cert. denied, 396 U.S. 1013 (1970). *Milliman* v. *Friedrich*, 42 U.S.L.W. 3230, No. 73-468 (8th Cir. April 17, 1973), cert. denied, 414 U.S. 1066 (1973).

It is clear, therefore, that an attorney does not act under "color of state law" when representing a client.

V. Rules of Comity and Abstention Should Operate so that this Court Abstains from Exercising Jurisdiction in the Instant Case.

It was held in *General Investment & Service Corp.* v. *Wichita Water Co.*, 236 F. 2d 464, 468 (10th Cir. 1956), that:

"The principle is well established and without dispute that under the rule of comity under our dual system of Government in cases involving state laws, rules or regulations, equitable considerations will under certain circumstances require federal courts to stay their hands where the parties have an adequate, speedy and complete determination of the controversy in a state tribunal. No cases need to be cited to support this statement. It is recognized without exception."

VI. A Class Action is Not Maintainable by the Petitioners.

We believe this issue has been waived by the petitioners since it is not argued or set forth in the petition for writ of certiorari.

VII. Marriage — Divorce — Alimony.

It is within the exclusive jurisdiction of the states to regulate and control marriage and divorce within their respective borders. *Cleveland* v. *United States*, 329 U.S. 14, 19 (1946). *Harris* v. *Turner*, 329 F. 2d 918, 923 (6th Cir. 1964), cert. denied, 379 U.S. 907 (1964), reh. denied, 379 U.S. 985 (1965).

VIII. General Argument.

The Court of Appeals correctly found that the petitioners' claim was without merit (Pet. App. A, 1a) and the three-judge court ordered the complaint be dismissed in accordance with the memorandum of decision (Pet. App. A, 2a-9a).

An examination of the petition reveals that it involves no novel or important questions of law. In *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U.S. 175, 178 (1938), this Court stated: "Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it."

This Court has held that certiorari should not be granted "except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of . . . authority between the circuit courts of appeal." *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U.S. 387, 393 (1923).

Respondents respectfully submit that there has been no such showing by this petition.

Conclusion.

Because the petition discloses no special or important reasons for review by this Court, but involves only questions of law which apparently are moot, it is respectfully submitted that the petition should be denied.

Respectfully submitted,

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